Michael Konig t/a Nursing Center at Vineland *and* Communications Workers of America, Local 1040, AFL–CIO. Cases 4–CA–21936, 4–CA–21948, 4–CA–22042, and 4–CA–22433

August 15, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND TRUESDALE

On May 23, 1994, Administrative Law Judge Marion C. Ladwig issued the attached decision. The Respondent filed exceptions, a supporting brief, a motion to reopen the record, and an answering brief to the Charging Party Union's exceptions. The General Counsel filed cross-exceptions, a supporting brief, and an opposition to the Respondent's motion to reopen the record. The Union filed exceptions, a supporting brief, an answering brief to the Respondent's exceptions, and a brief in opposition to the Respondent's motion to reopen the record.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, briefs, and motion and has decided to affirm the judge's rulings, findings[1] and conclusions[2] as modified below and to adopt the recommended Order as modified.

I. THE RESPONDENT'S CHALLENGE TO THE EMPLOYEE STATUS OF ROBERT GRIMALDI

We agree with the judge, for the reasons stated by him, that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Robert Grimaldi. The Respondent, seeking to show that Grimaldi was a supervisor within the meaning of Section 2(11) of the Act and that it therefore could not be liable under Section 8(a)(3) for discharging him, moves to reopen the record in order to put on evidence of Grimaldi's alleged supervisory status. The Respondent argues that it was precluded from raising that issue during the trial of this case because the Supreme Court's decision in *Health Care & Retirement Corp. v. NLRB*, 114 S.Ct. 1778 (1994), which reversed some aspects of Board law applicable to the supervisory status of charge nurses, had not yet issued. The Respondent reasons that it was not then on notice of a defensible theory for arguing that Grimaldi was a supervisor. For the following reasons we disagree and deny the motion to reopen.

The Respondent originally filed its motion to reopen on this issue after the hearing had closed and the judge had issued his decision. Efforts to inject a new issue after the close of a hearing are normally deemed untimely,[3] and we find that the Supreme Court's issuance of its decision in *Health Care & Retirement* does not warrant a departure from that rule here. At the time this case went to trial, the Supreme Court had already granted certiorari in *Health Care & Retirement*, and there was nothing to prevent the Respondent from raising arguments concerning supervisory status similar to those that parties to many other Board proceedings, including the successful party in *Health Care & Retirement*, had raised.[4] Yet the Respondent, while litigating the supervisory status of Gwen Drew (now contending, contrary to its position in an earlier representation proceeding, that she was *not* a supervisor), did not raise any similar issue concerning Grimaldi. It is therefore barred from raising it now,[5] even assuming that the Respondent were proffering evidence that is now relevant in the light of the Supreme Court's opinion in *Health Care & Retirement*.[6]

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

No exceptions were taken to the judge's finding that the Respondent violated Sec. 8(a)(5) of the Act by refusing to bargain with the Union unless and until the Union requested withdrawal of its NLRB charge. We find merit in the Charging Party's exceptions to the wording of the Order and notice, and we shall modify the Order and notice to conform to the violation found.

[2] We deny the General Counsel and Charging Party's exceptions to the judge's dismissal of an 8(a)(5) allegation that in bargaining with the Union the Respondent failed and refused to meet at reasonable times and for reasonable hours. Although the judge found Staff Representative Robert Yaeger to be a truthful witness, he nevertheless found that Yaeger's testimony regarding this allegation was inexact and inaccurate instead of being the accurate and detailed testimony which was necessary to support the allegation. For these reasons, the judge found that the General Counsel failed to prove the complaint allegation. We find that the record evidence supports the judge's findings and conclusions.

[3] See, e.g., *Public Service Co.*, 312 NLRB 459, 461 (1993); *Cliffstar Transportation Co.*, 311 NLRB 152 fn. 4 (1993).

[4] See *Opportunity Homes, Inc.*, 315 NLRB 1210 (1994).

[5] We also note that the Respondent had failed to argue in the earlier representation proceeding (Case 4–RC–17874), that Grimaldi was a supervisor. In that proceeding, the Regional Director classified all the LPNs, including Grimaldi, as employees within the bargaining unit. The Respondent had contended that three of those LPNs (but not Grimaldi) were supervisors, and the Respondent filed no request for review of the Regional Director's Decision and Direction of Election that found none of the LPNs to be supervisors. The Respondent was thus barred from raising the LPN supervisory issue in any subsequent challenge to the certification. *Flatbush Manor Care Center*, 314 NLRB 702, 703 fn. 4 (1994).

[6] The Supreme Court held that the Board's construction of the phrase ''in the interest of the employer'' in Sec. 2(11) of the Act was incorrect, and that supervisory status determinations based on that reading were invalid. The Court did not decide that the nurses whose status was at issue in that case were supervisors, but merely remanded for a determination of their status based on an application of the other language in Sec. 2(11). The decision of the Regional Director in the representation proceeding involving the Respondent's

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Finally, we agree with the Charging Party that the Respondent has vacillated regarding the supervisory status of its RNs and LPNs in the various proceedings involving these two bargaining units, advancing whichever argument would give it a tactical advantage in the particular proceeding in which it was made. (Thus, the Respondent made no claim that Grimaldi was a supervisor until it faced liability for discharging him; and it admitted supervisory status for Drew in the representation proceeding, where that kept her out of the unit, but contended to the judge in this proceeding that she was not a supervisor, when it was faced with an allegation that she had issued an unlawful warning.) We agree with the judge that the actions of the Respondent's counsel regarding the status of Drew in this proceeding were ''not in good faith and [were] willfully . . . frivolous.''[7]

II. THE 10(B) ISSUE CONCERNING THE RESPONDENT'S UNILATERAL WAGE RATE DECREASE

A. *The Judge's Decision and the Parties' Positions*

The judge found that the Respondent unilaterally decreased the wage rate of LPN Harriet Boykin in July 1993 without notifying the Union or giving the Union an opportunity to bargain about the reduction. He held, however, that because the corresponding complaint allegation was based on a charge that was filed more than 6 months after the initial decrease, the allegation was barred by Section 10(b) of the Act. The judge did not take issue with the established rule that the 10(b) period does not begin running until the charging party is on notice—either actual or constructive—of the existence of facts that would establish the violation.[8] Moreover, he acknowledged that Boykin had not told the Union about the Respondent's action until January 1994, several weeks before the Union filed the charge. He found, however, that the Union had constructive knowledge before Boykin reported the matter, because the Respondent and the Union had been engaged in contract negotiations and the Union had one or more unit employees on its negotiating committee.

The General Counsel and the Charging Party except, contending that the Union lacked constructive knowledge of the unfair labor practice, and that therefore the 10(b) period did not begin to run until Boykin communicated the information. For the reasons discussed below, we agree; and we therefore reverse the judge's dismissal and find that the Respondent violated Section 8(a)(5) and (1) by unilaterally decreasing Boykin's wage rate.

B. *Pertinent Factual Findings*

Boykin was hired as an LPN and began working in December 1992. Her wage rate included a $1 bonus for each hour she worked during the previous month. When she did not receive her June 1993 bonus check in July, Boykin asked Executive Director Urgo why she had not received her check. She was told by Nursing Director Aponte, who had taken over the bonus program, that she had stopped it. Thus, the judge found that Boykin's wage rate was decreased starting sometime in July 1993. Boykin did not report the Respondent's unilateral action to the Union until January 1994. She testified that she did not report the stopping of the bonus check because ''I didn't know I could. I didn't know that we were really covered by the union since the contract hadn't been signed.''

In July 1993, when Boykin was advised about the termination of the bonus, the Union had a request for information, including information about the employees' wages, pending with the Respondent. The Respondent had not provided the information despite the Union's renewal of the request, and the parties had met for only three bargaining sessions since the Union's certification on October 27, 1992. A further delay of negotiations between August 19 and October 20, 1993,[9] was occasioned by the Respondent's unlawful refusal to bargain while an unfair labor practice filed by the Union was pending with this Agency. Although in December the Union withdrew its charge concerning the request for information, it is noteworthy that the Respondent's counsel had been withholding some requested data at least through most of October.

Between the time that Boykin's bonus was withdrawn and the date that she informed the Union about it, the union negotiating committee included only one current employee, in part because of unlawful discharges by the Respondent. The one current employee, Carmen Ocasio, did not work on Boykin's 3–11 p.m. shift.[10]

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operation here rested on other language of Sec. 2(11), and the Respondent has proffered no evidence in its motion to reopen in this case that would necessarily compel a finding of supervisory status under the Supreme Court's holding in *Health Care & Retirement*.

[7] We agree with the judge that counsel for the Respondent, in denying Drew's supervisory status, willfully interposed an answer to a complaint allegation without a good-faith doubt of the facts asserted in the complaint and for the purpose of delay. We express our strong disapproval of such conduct by Stuart Bochner, Esq., and warn him against similar conduct in future appearances before the Board. See *Graham-Windham Services*, 312 NLRB 1199 fn. 2 (1993).

[8] *Leach Corp.*, 312 NLRB 990, 991 (1993), enfd. 54 F.3d 802 (D.C. Cir. 1995).

[9] All dates hereafter are 1993 unless indicated otherwise.

[10] Of the three employee-members of the committee originally appointed by the Union, one (Darlene Lindsay) had been unlawfully discharged by the Respondent (see *Nursing Center of Vineland*, 314 NLRB 947, 954 (1994), one (Patricia Chopek) was a part-time employee who got no more assignments after she began participating in negotiations, and the third, Carmen Ocasio, worked on the 7 a.m.—3 p.m. shift. We have in this decision adopted the judge's

C. *Analysis*

As indicated above, the critical issue is whether, under all the circumstances of its bargaining relationship with the Respondent, the Union had constructive knowledge of all changes in the unit employees' wages and benefits, whether or not the employees expressly notified the Union of them. The concept of constructive knowledge incorporates the notion of ''due diligence,'' i.e., a party is on notice not only of facts actually known to it but also facts that with ''reasonable diligence'' it would necessarily have discovered.[11] It is settled that a respondent asserting a 10(b) defense bears the burden of establishing that the charging party had such notice more than 6 months before filing the charge.[12]

In finding that the Union had constructive knowledge of the bonus termination on the basis of Boykin's knowledge, the judge construed Board precedents—in particular *Adair Standish Corp*., 295 NLRB 985, 986 (1989), on which the General Counsel relied—as implicitly holding that knowledge of bargaining unit employees concerning their terms and conditions of employment will be imputed to their collective-bargaining representative *unless*, during the period of time at issue, the employer was declining to recognize the representative. The cases in fact set out no such strict rule of imputation; rather, they simply indicate that whether unit employees' knowledge is imputed to their bargaining representative for purposes of determining when the 10(b) limitations period commences depends on the factual context. An employer's withholding of recognition is one factor that will militate against such an imputation of employee knowledge to the bargaining representative. In our view, the facts established here also militate against such a finding.

The Union's ability to monitor changes in wages and working conditions of any and all unit employees was hampered, as shown above, by delays in the Respondent's submission of requested information.[13] The Respondent's discharges of union activists further operated to impede the flow of information between employees on all three shifts and knowledgeable union representatives who could perceive whether a change in pay or benefits was arguably unlawful under the Act. It is unsurprising, then, that the Union was not immediately aware in July that the Respondent had unilaterally made a material change in a term of Boykin's employment.

The foregoing facts distinguish this case from *Moeller Bros. Body Shop*, 306 NLRB 191 (1992), on which the Respondent relies. In *Moeller Bros.*, the Board held that Section 10(b) barred an allegation of an employer's unlawful failure to make benefit fund payments for certain unit employees. It reasoned that the charging party union had actual knowledge of how many body shop employees the employer was making payments for (the number was indicated on regularly filed fringe benefit forms) and, had it exercised due diligence, the union would soon have discovered that there were a number of other employees for whom payments were not being made. The union had not been denied access to the shop, and ''[m]ere observation'' would have disclosed the discrepancy in numbers. Id. at 192. Because no union representative had ever bothered to visit the shop for 12 years and the union was able to discover the violation immediately when it finally got around to visiting, the Board found a failure of due diligence and imputed constructive knowledge of the violation outside the 10(b) period.

Here, by contrast, there is no evidence the Union had been advised by the Respondent of bonus payments as a component of wages for any employees or of changes in any such bonus payments; indeed, the flow of information concerning terms and conditions of employment had been impeded by the various circumstances discussed above. Furthermore, unlike the employees working in the body shop in *Moeller Bros*., Boykin's paycheck was not subject to general observation.

Accordingly, we find that the Union was not on notice of the unilateral change in Boykin's wage rate until Boykin advised the Union of it, and therefore the charge filed on February 14, 1994, about a month after Boykin reported the change, was within the limitations period established by Section 10(b).

Because wages are a mandatory subject of bargaining and it is undisputed that the Respondent made the change in Boykin's wage rate without giving the Union notice and an opportunity to bargain, we find, on the merits, that the Respondent violated Section 8(a)(5) and (1) of the Act in making this change.

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 4.

''4. By refusing to bargain by unilaterally reducing unit employee Harriet Boykin's wage rate beginning June 1993, the Respondent violated Section 8(a)(5) and (1).''

finding that Robert Grimaldi, an alternate representative on the negotiating committee, was unlawfully discharged in June.

[11] *Oregon Steel Mills*, 291 NLRB 185, 192 (1988), enfd. mem. 134 LRRM 2432 (9th Cir. 1989), cert. denied sub nom. *Gilmore Steel Mills v. NLRB*, 496 U.S. 925 (1990).

[12] *Leach Corp*., supra at 991, and cases there cited.

[13] We acknowledge that the Union withdrew its unfair labor practice charge pertaining to withholding of information, so the Respondent cannot be deemed guilty of any unlawful withholding. Nonetheless, in assessing the Union's diligence under all the circumstances, we can take account of facts—established by documents and uncontradicted testimony—indicative of what information was made available to the Union.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Michael Konig t/a Nursing Center at Vineland, Vineland, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b).

''(b) Refusing to bargain with the Union on the condition that the unfair labor practice charges against the Company be withdrawn.''

2. Add the following as paragraph 1(c) and reletter the subsequent paragraph.

''(c) Unilaterally decreasing wages of unit employees without consulting with the Union and providing it with an opportunity to bargain about the matter.''

3. Add the following as paragraph 2(c) and reletter the subsequent paragraphs.

''2(c) Restore Harriet Boykin's bonus structure and make employee Harriet Boykin whole for any loss she may have suffered by reason of the Respondent's decrease in her wages, less any appropriate deductions, plus interest.''

4. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the Communications Workers of America, Local 1040, AFL–CIO or any other union.

WE WILL NOT unilaterally alter terms and conditions of employment including wages and bonuses of unit employees without consulting the Union and affording the Union a reasonable opportunity to bargain on such proposed changes.

WE WILL NOT refuse to bargain with the Union on the condition that the unfair labor practice charges against the Company be withdrawn.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Robert Grimaldi immediate and full reinstatement to this former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and we will make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL notify him that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

WE WILL restore Harriet Boykin's bonus structure and WE WILL make her whole for any loss of earnings resulting from the decrease in her wages, less any appropriate deductions, plus interest.

MICHAEL KONIG T/A NURSING CENTER AT VINELAND

Donna C. Richardson, Esq., for the General Counsel.
Stuart Bochner, Esq. and *Steven B. Horowitz, Esq.*, of South Orange, New Jersey, for the Respondent.
Lisa Morowitz, Esq., of Somerset, New Jersey, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARION C. LADWIG, Administrative Law Judge. These consolidated cases were tried in Philadelphia, Pennsylvania, on February 10 and March 21, 1994. Charges against the Respondent were filed by the Union in Case 4–CA–21936 on July 30, 1993,[1] in Case 4–CA–21948 on August 2, and in Case 4–CA–22042 on September 1 (amended September 16 and October 4), and a consolidated complaint was issued September 30 (amended December 1 and 21). The charge in Case 4–CA–22433 was filed on February 14, 1994 (amended March 10), and a complaint was issued March 16 and consolidated March 21, 1994.

In December 1992, after the Union was certified to represent the licensed practical nurses (LPNs), Robert Grimaldi's RN supervisor warned that both Grimaldi and his LPN wife would be discharged if the Union pressed her workers' compensation claim. About early April, during negotiations for a first collective-bargaining agreement, the Union publicized the warning and informed the Respondent that it had retained an attorney ''to represent Grimaldi.'' It encouraged its members to protest ''at the nursing home on behalf of the Grimaldis.''

In late May, after Grimaldi became an alternate bargaining committee member, an RN supervisor observed him distributing a union leaflet, criticizing the Respondent's bargaining.

[1] All dates are in 1993 unless otherwise indicated.

He told the supervisor that the negotiations were stalled because the Respondent was not bargaining in good faith. On June 2 the nursing director called Grimaldi to her office. There she summarily discharged him, claiming that he gave a resident one instead of two diuretic tablets and gave another resident Tylenol instead of a narcotic Darvocet N100 pain medication—*before* hearing his vigorous denial. At the trial the Respondent failed to present any evidence to support the accusation that Grimaldi—for the *first* time—had given improper medication.

The primary issues are whether the Respondent: (a) unlawfully discharged Grimaldi because he supported and assisted the Union, (b) refused to bargain in good faith, violating Section 8(a)(1), (3), and (5) of the National Labor Relations Act, and (c) whether the Union filed an untimely charge alleging the unilateral decrease in an employee's wage rate.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a sole proprietorship own by Michael Konig, operates a long-term nursing home at its facility in Vineland, New Jersey, where it annually receives over $100,000 in gross revenues and receives goods valued over $50,000 from outside the State. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Discharge of Robert Grimaldi*

1. Background

Grimaldi was hired October 2, 1992, as a graduate practical nurse. In December 1992, after he obtained his license, he was promoted to licensed practical nurse (LPN). (Tr. 9.)

Meanwhile on October 27, 1992, the Union (CWA Local 1040) was certified as the collective-bargaining representative of the LPNs in the following appropriate unit (G.C. Exhs. 1i, 1m):

> All full-time and regular part-time Licensed Practical Nurses (LPNs) employed by [the Respondent] at the Vineland facility, excluding all other employees, registered nurses, quality assurance employees, nurse's aides, clerical employees, housekeeping employees, dietary employees, laundry employees, guards, and supervisors as defined in the Act.

Grimaldi's wife Antoinette, an LPN at the nursing home, was injured on the job in November 1992. The Respondent failed to file her claim for workers' compensation as she requested, and Grimaldi and his wife asked the Union ''to get our workmen's comp claim through.'' In mid-December 1992, Grimaldi's supervisor, Gwen Drew, one of the six supervisory registered nurses (RNs), asked Grimaldi how his wife was doing and about the workers' compensation claim. (Tr. 12; G.C. Exh. 3 fn. 4.) When Grimaldi told her that ''the CWA said that they would represent us,'' Drew warned that both Grimaldi and his wife would be discharged.

It is undisputed, as Grimaldi credibly testified, that Drew told him (Tr. 13, 18):

> You're going to end up getting fired . . . if you know what is good for you and your wife, [she should] just come back to work.
>
> Wouldn't it be worth it for her to keep her nursing license and for you to keep your job [rather than her getting] a couple of weeks' pay that she had missed? And [Drew] said that, with such a corporation as large as the Nursing Center's corporation, that the CWA may be good, but they can't win over a corporation as large as Mr. Konig's.
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> . . . .
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> A. [Drew] said that we would never work as nurses, that we would lose our licenses eventually, I would be terminated, and that was . . . when I had told her that we were seeking legal counsel through the CWA for the workmen's comp case.

This warning in mid-December 1992, over 6 months before the first charge was filed on July 30, is not alleged to violate the Act.

2. Grimaldi's union support

About the first week in April (2 months before Robert Grimaldi's summary discharge on June 2) the Union ran a two-column article in its newsletter under the heading, ''Nurse Threatened and Denied Worker's Comp'' (G.C. Exh. 21).

The article (G.C. Exh. 21 p. 2) reported that LPN Antoinette Grimaldi was ''hurt on the job last November'' when ''An IV pole with two casters instead of the usual four started to fall on a client, but Grimaldi got between the patient and the pole. The pole knocked her unconscious as it fell.'' The article stated that the Respondent never filled out the workers' compensation paperwork ''or authorized her visits to the specialist she needed to see.'' It quoted Executive Director Sheree Urgo's telling her that she was probably not eligible for workers' comp.

The article further stated that Robert Grimaldi's supervisor (Gwen), Drew told him that

> ''If [his wife] files any kind of lawsuit against the facility, she will lose her job—even if false evidence has to be filed against her.''
>
> ''Some people can repeatedly screw up and keep their jobs, while someone who is wanted out will get blamed for their mistakes,'' Drew added.
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> ''*They will make sure that you two never work as nurses again*. Does she really think a LPN can win over a corporation as big as we are? . . . You better explain these things to her and ask her if it's really worth it,'' Drew said to Robert Grimaldi. [Emphasis added.]
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> CWA Local 1040 has informed Drew, Urgo, [Assistant Administrator] Samantha Neuman and facility owner Michael Konig that it will not tolerate this treat-

> ment for one of its members. It has retained an attorney, William Covert, to represent Grimaldi.
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> . . . .
>
> ''I cannot believe that a facility is treating a worker so incredibly badly and then threatened her to boot,'' Local 1040 President Carolyn Wade said.
>
> ''I know that [our] members . . . are looking forward to protesting at the nursing home on behalf of the Grimaldis,'' Wade added. ''We can have war or we can have peace, whichever management prefers.''

The Respondent's response was its counsel's, Stuart Bochner, letter to the Union, dated April 6 (G.C. Exh. 21). The letter attached a copy of the newsletter article and advised that unless the Union ''retracts these libelous statements the Nursing Center and the individuals involved will take legal action.''

By this time Grimaldi was openly supporting the Union. At the May 26 monthly union meeting, where he was appointed an alternate member of the bargaining committee, he took about 20 copies of a leaflet that criticized the Respondent's bargaining. He distributed the union leaflets at the nursing center as he ''went through to various nurses and left some at each one of the nursing units.'' (Tr. 11.)

It is undisputed that RN Kalita Galanko, whose supervisory status is specifically admitted, observed Grimaldi's placing some of the leaflets on the A Unit desk. She asked him how the bargaining was going. As Grimaldi credibly testified, ''I told her that basically it was stalled and that nothing was happening because they weren't bargaining in good faith, which is what the newsletter had said.'' (Tr. 11–12; G.C. Exhs. 1i, 1m.)

The next week Grimaldi was called to the office and discharged.

3. Grimaldi's summary discharge

About 3:30 p.m. on June 2, at the beginning of his shift, Robert Grimaldi was called to Nursing Director Abbie Aponte's office, in the presence of Assistant Administrator Samantha Neuman and staff LPN Michael Farrell. Seeing ''Insulin for Mary Gould left in med cart [not] refrigerated as per facility practice'' written on a sheet of paper (G.C. Exh. 2, reverse side) on Aponte's desk, Grimaldi told Aponte yes, he had forgotten to put it away. The insulin had been left, locked and unharmed, in the medication cart. (Tr. 9–10, 27, 49–51, 55.)

It is undisputed, as Grimaldi credibly testified (Tr. 10):

> [Aponte] told me that wasn't the reason why she had called me in there; and she said that two patients stated that I did not give them medications, and she said that the patients are alert and oriented and they know what medications they are to receive.
>
> She said that I was terminated, that this was a serious charge, and that I was terminated. I insisted that I gave the medications properly. I'm positive that I gave them proper medications at the proper times. She said that wasn't the case and that I was terminated, asked for the keys to the med cart, and I told her that I wanted union representation, and she said that Michael Farrell was a staff LPN and a member of the Union; therefore, he was my union representative by proxy. And I said that was not the case, and she said that I was terminated and to leave. I refused to sign the disciplinary note and then left.

The disciplinary action sheet, dated June 2 (G.C. Exh. 2), stated that Patient G.G. ''was given 1 tab Lasix 40 mg; order reads 80 mg. Resident states only received 1 tab.'' It also asserted that Patient L.L. ''states was denied Darvocet N100 [that] was ordered and Tylenol was given in lieu of Darvocet N100. However, Darvocet N100 was signed twice. These residents are alert and oriented; they are aware of meds and their needs.'' It further stated that Patient L.L. was ''denied pain medication and in pain and medication was signed as given (narcotic) not following physician's orders.'' (The reference to the insulin continued on the back of the sheet.)

Thus, the next week after a supervisor observed Grimaldi passing out the union leaflet, and based solely on the purported word of two patients, the Respondent summarily discharged Grimaldi for giving a patient (identified as ''G.G.'') one instead of two tablets of Lasix (a diuretic that is not a controlled substance), and giving a patient (identified as ''L.L.'') a Tylenol tablet instead of Darvocet N100, a pain medication that is a controlled and regulated substance. (Tr. 43–44, 46.)

The Respondent did not call Nursing Director Aponte or any other witness to support the claim that Grimaldi had given improper medication, or to explain why it decided to discharge Grimaldi without first checking with him to determine if there was any truth to the purported complaints. There is no supporting evidence that two patients actually made the complaints.

Grimaldi testified that he had given medication to about 28 or 30 patients and that he was positive that he ''gave them proper medications at the proper times.'' (Tr. 10, 46–47.) By his demeanor on the stand, he impressed me most favorably as a truthful, forthright witness.

He had never before been accused of giving improper medication. His only previous incident involving a controlled substance occurred about the first of December 1992, presumably when he was still working as a graduate practical nurse, before being promoted in December to an LPN. He found a Tylenol No. 4 tablet (containing codeine) in his pocket at home and tried to return it to the nursing home. Aponte later gave him a receipt for the tablet, formally disciplined him for removing the tablet from the facility, and said she would give him a 1-day suspension sometime in the future, but never did. (Tr. 9, 12, 39–42.)

4. Supervisory status of RN Gwen Drew

Although the Respondent had admitted in the previous representation proceeding the supervisory status of the six registered nurses employed at the nursing home, it belatedly denied at the trial that one of them, RN Drew (who now works elsewhere), was a supervisor.

In Case 4–RC–17864 the Regional Director made the following findings in his Decision and Direction of Election, issued September 17, 1992 (G.C. Exh. 3 fn. 4):

> The nursing department is headed by the Director of Nursing [Abbie Aponte], and consists of six RNs, at least one of whom is present on each shift, the 30

> LPNs sought by the petition and 87 nurse's aides. RNs supervise the LPNs and nurse's aides.
>
> [LPN Darlene] Lindsey [a charge nurse or team leader] testified that she has given two verbal and two written warnings to nurse's aides. The written warnings were issued after consultation with and *upon the direction of RN supervisors*, the [Director of Nursing] or the Executive Director [Sheree Urgo]. [Emphasis added.]
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> Based on the foregoing, I find that . . . Lindsey's warnings were issued upon instruction of admitted [RN] supervisors, after consulting with management officials . . . [and] do not establish supervisory authority.

Thus, in the representation case, the Respondent admitted that the six registered nurses (one of whom was Gwen Drew) were supervisors. The Respondent offered no evidence at the trial to the contrary. It admitted in its answer that Kalita Galanko (another one of the six RNs) is a supervisor (G.C. Exhs. 1i, 1m).

Near the beginning of the trial when the General Counsel presented, as background evidence, Grimaldi's testimony of Drew's warning of discharge—to reveal a discriminatory motivation for Grimaldi's subsequent discharge—the Respondent's counsel moved to strike the testimony (Tr. 13–14):

> MR. BOCHNER: That person is not alleged to be Supervisor in the Complaint.
>
> THE WITNESS: She's an RN.
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> . . . .
>
> MS. RICHARDSON [for the General Counsel]: Your Honor, yes, I can ask the questions to lay the foundation for her supervisory status.
>
> MR. BOCHNER: No. You can't because whether she is a supervisor or not is not the relevant issue. What is relevant is that she's not alleged in the Complaint to be a supervisor. . . .
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> . . . .
>
> JUDGE LADWIG: Is there any question about the supervisory status of this individual?
>
> MR. BOCHNER: Judge, I have no idea.

Counsel Donna Richardson then protested (Tr. 15) that ''it is certainly untrue that Mr. Bochner . . . has no idea about [Drew's] supervisory status.'' She was referring to Bochner's April 6, 1993 letter (G.C. Exh. 21) threatening legal action unless the Union retracted ''libelous statements'' in its newsletter (which, as discussed above, reported Supervisor Drew's warning that the Respondent ''will make sure'' that the Grimaldis ''would never work as nurses again'').

Counsel Bochner insisted (Tr. 16–17) that whether or not Drew is a supervisor, ''that's not the issue. . . . *I may turn out and admit that she's a supervisor*'' (emphasis added) and added ''We don't get to the issue of whether or not she's a supervisor until we get to the issue of whether or not the Complaint is being amended to allege that she is a supervisor.''

Regarding the relevance of Drew's alleged threat—being outside the 10(b) period, but offered as background evidence—the counsel conceded (Tr. 17):

> MR. BOCHNER: I would think that *it certainly would be relevant to show motivation*, and I'm not saying it's not relevant if Ms. Drew is a supervisor and if we had notice that they were going to rely on her supervisory status for anything. [Emphasis added.]

After Grimaldi credibly testified (Tr. 22) that Drew attended management meetings with Executive Director Sheree Urgo and Assistant Administrator Samantha Neuman, Counsel Bochner stated (Tr. 23): ''I need very little time'' to determine whether the Respondent wants to stipulate Drew's supervisory status. ''What I need time on is . . . to find out what her testimony might be, and to find out whether I want to call her as a witness.'' He added that he thought ''the supervisory part is easy'' and (Tr. 25) ''I'll be able to stipulate [one way or the other] after one telephone call.'' He did not indicate if he considered it necessary to speak to Drew (rather than a management official) to determine her supervisory status.

After lunch on the first day of trial, when the General Counsel sought to introduce the Decision and Direction of Election (G.C. Exh. 3), in which the Regional Director found that the Respondent admitted the supervisory status of the six RNs, counsel Bochner stated (Tr. 65), ''I would think it probably is *not* necessary'' to get a lot of evidence on supervisory status. [Emphasis added.] He next stated (Tr. 68): ''I have briefly spoken to Ms. Drew, who was on her way to work when I reached her'' and could not talk. He still did not reveal whether the Respondent would stipulate her supervisory status. He stated, ''I would request that the matter be adjourned for sufficient time so that I can find her, talk to her, and, if necessary, subpoena her appearance.''

Later that day, February 10, 1994, the General Counsel's motion was granted to amend the complaint to allege that Gwen Drew was a supervisor (Tr. 110, 113). The trial was adjourned over 5 weeks until March 21, 1994. (Tr. 116.)

By March 21, 1994, when the trial resumed, the Respondent had decided not to call Drew as a witness, leaving undisputed her warning that the Respondent would discharge Grimaldi if the Union pressed his wife's workers' compensation claim. Instead, without any explanation for reversing its position in the representation proceeding, the Respondent denied the allegation that Drew was a supervisor (Tr. 141): ''Mr. Bochner: The allegation is denied.''

Near the end of the trial, over the Respondent's objections (Tr. 25, 253–257), the Union's counsel recalled as a rebuttal witness LPN Harriet Boykin, who credibly testified that Drew had been an RN supervisor at the nursing home and that the RNs discipline their subordinates. Boykin, working as a charge nurse, ''go[es] through several supervisors during the week,'' working under three different registered nurses as her immediate supervisors. When she, as a charge nurse, has a particular problem with a coworker, she notifies the RN supervisor, who directs the course of action to be taken and Boykin is obligated to carry forth that direction. Boykin and the other LPNs take orders from the RN supervisors. (Tr. 257–260.)

There is no evidence to the contrary, and the Respondent does not deny in its brief that Drew was a supervisor. I find that RN Drew (who attended management meetings, as Grimaldi credibly testified) was a supervisor within the meaning of Section 2(11) of the Act.

As found, the Respondent had previously admitted the supervisory status of its six registered nurses (one of whom was Gwen Drew). It also admitted in its answer the super-

visory status of Kalita Galanko (another one of the six RNs). Moreover, its counsel stated at one point at the trial that he ''may'' admit Drew's supervisory status. Yet, when the Respondent decided (after a 5-week adjournment of the trial) not to call Drew as a defense witness—leaving undisputed her warning that the Respondent would discharge Grimaldi if the Union pressed his wife's workers' compensation claim—the counsel announced a reversal of the Respondent's previous admission. He categorically denied the allegation that Drew was a supervisor.

I find that Counsel Stuart Bochner, when he belatedly denied RN Drew's supervisory status, did not do so in good faith. I find that in reversing the Respondent's previous admission, he was willfully taking a frivolous position, both for delay and to abuse the Board's processes. The Board may want to express its disapproval of such conduct.

Compare the Board's Rules and Regulations, Sec. 102.21, that the signature of an attorney on an answer constitutes a certification that ''to the best of his knowledge, information, and belief there is good ground to support it'' and ''not interposed for delay'' and that ''for a willful violation of this rule an attorney may be subjected to appropriate disciplinary action.'' *Graham-Windham Services*, 312 NLRB 1199 fn. 2 (1993).

5. Contentions of the parties

The General Counsel contends that because the Respondent ''failed to call a single witness'' and failed to ''produce other evidence in the form of documents such as patient complaint forms or medication records,'' an adverse inference should be drawn that if the Respondent had done so, the evidence would have corroborated Grimaldi's denial that he failed to dispense proper medication to two patients. *Martin Luther King Nursing Center*, 231 NLRB 15 fn. 1 (1977).

Regarding the Respondent's motivation, the General Counsel cites RN Supervisor Drew's warning that Grimaldi would eventually be terminated for seeking union assistance in the workers' compensation dispute, the Union's publication of the newsletter indicating its support of Grimaldi and his wife and its ''soliciting the membership to protest'' on their behalf, and Grimaldi's becoming an alternate member of the negotiating committee and being observed by RN Supervisor Galanko distributing the union pamphlet.

Without any explanation, the Respondent contends in its brief (at 6):

> Finally, the Complaint alleges violation of Section 8(a)(3) of the Act in the Respondent's treatment of employee Robert Grimaldi. Counsel for General Counsel has not proven that Respondent's actions were in any way related to Grimaldi's Union activities or were pretextual. Rather, the evidence clearly indicates, and Grimaldi admits himself, that the Employer's actions pertained to Grimaldi's discipline over the improper use and failure to account for medication and controlled substances. It is clear from the testimony that Respondent had proper reason to discharge Grimaldi because in all respects he violated both Employer policy and State and Federal law with respect to controlled substances. There can be no justification for this conduct nor can it in any way be deemed pretextual. No violation of Section 8(a)(3) should be found.

6. Concluding findings

RN Supervisor Drew, who attended management meetings with Executive Director Urgo and Assistant Administrator Neuman, revealed to Robert Grimaldi the Respondent's discriminatory motivation in December 1992 when Drew warned that the Respondent would discharge Grimaldi and his wife if the Union pressed the wife's workers' compensation claim. Undoubtedly this motivation was reinforced when Grimaldi provided a full account of the warning to the Union, which about early April promulgated the warning in its newsletter and encouraged its members to protest at the nursing home.

Afterward Grimaldi actively supported the Union at the nursing home, becoming an alternate bargaining committee member. In late May he also made himself a more prominent supporter of the Union by distributing its leaflet at the home and telling an RN supervisor the content of the leaflet, that the Respondent was not bargaining in good faith.

The following week, although the Respondent had never before accused Grimaldi of giving any resident improper medication, its director of nursing called him to her office and summarily discharged him before giving him any opportunity to be heard on an accusation that he had given improper medication to two residents. She had prepared a disciplinary action sheet, terminating him for giving one instead of two diuretic tablets to one patient and giving Tylenol instead of a narcotic pain medication to another. Although Grimaldi insisted that he gave the medications properly, she repeated that he was terminated and ordered him to leave.

Particularly because of (a) the timing, the week after Grimaldi's prominent union support, becoming an alternate member of the bargaining committee and assisting the Union in conveying to the nursing home employees its belief that the Respondent was stalling and not bargaining in good faith, (b) Grimaldi's participation with the Union in promulgating the Respondent's earlier warning (through RN Supervisor Drew) that it would discharge Grimaldi and his wife if the Union pressed the wife's workers' compensation claim, and (c) the Respondent's summarily discharging Grimaldi for a first-time failure to give proper medication without first checking with him to determine if it actually happened, I find that the General Counsel has made a prima facie showing that Grimaldi's union support was a motivating factor in the Respondent's decision to discharge him. Therefore, as held in *Wright Line*, 251 NLRB 1083 (1980), the burden shifted to the Respondent to demonstrate that it would have discharged Grimaldi in the absence of his union support.

Clearly the Respondent has failed to carry this burden. Not only has the Respondent failed to demonstrate that it would have discharged Grimaldi for such a claimed first-time deficiency if he had not supported the Union, but it also has failed to prove that there was any deficiency. The Respondent did not call any witness, or present other evidence, to prove either a fact or a belief that Grimaldi had not given the proper medication, or that either of the two residents had actually made a complaint. Moreover, because of Grimaldi's demeanor on the stand, I credit his testimony that he is positive that he gave the patients proper medications.

I therefore find that by discharging Robert Grimaldi on June 2, 1993, the Respondent discriminated against him in violation of Section 8(a)(3) and (1) of the Act.

B. *Refusal to Bargain*

1. During pending NLRB charge

The complaint alleges that since about August 19 the Respondent ''refused to bargain further with Union unless and until the Union requests withdrawal of charges it filed.''

On August 2, after the Respondent and Union had agreed on July 28 to continue bargaining on August 23 (G.C. Exh. 17), the Union filed a refusal-to-bargain charge against the Respondent in Case 4–CA–21948. The charge (G.C. Exh. 1c) alleged that the Respondent had not provided certain documents requested since November 19, 1992, and had canceled numerous scheduled bargaining sessions, sometimes giving less than 24 hours' notice.

On August 19 the Respondent notified the Union (G.C. Exh. 18) that the

> Employer *will await* instructions from the NLRB and *the outcome of that litigation* to continue bargaining. If, on the other hand, the Union expects us to continue our good faith negotiations, we will do so. We are ready, willing, and able to meet with you as scheduled on August 23, 1993. However, we will not do so should your choice be pursuing the matter through the NLRB. [Emphasis added.]

The Respondent's only defense for refusing to bargain while the NLRB charge was pending is stated in its brief (at 4) as follows:

> While certainly [if] Respondent acted in accordance with such a threat there would be a technical violation of Section 8(a)(5), in point of fact Respondent *never carried out any aspect of this supposed threat*. Rather, after the letter was sent Respondent continued with negotiations and continued placing offers and counter offers on the bargaining table at all sessions which occurred thereafter. [Emphasis added.]

Contrary to this contention that it ''never carries out any aspect of this supposed threat,'' the Respondent stated otherwise at the trial (Tr. 108):

> MR. BOCHNER: The letter says what the letter says, clearly.
>
> JUDGE LADWIG: Now, when did you retract that position, either by your action or by word?
>
> MR. BOCHNER: I would say, Judge, somewhere in and around October 20.

Thus, the Respondent admitted at the trial that it did, for a period of time, carry out the ''threat'' or ''supposed threat'' in its August 19 letter that it ''will await . . . the outcome of that litigation [of the pending NLRB charge] to continue bargaining.'' It did not retract that position until (in Counsel Bochner's words) ''somewhere in and around October 20.'' By the Respondent's own admission, it was refusing to bargain for a 2-month period because of the pending NLRB charge.

I find that the Respondent's refusal to bargain with the Union for this 2-month period, unless the Union requested withdrawal of its NLRB charge, violated Section 8(a)(5) and (1) of the Act.

2. Reasonable negotiating times and hours

The complaint alleges that the Respondent, from about February 2 until December 9, ''failed and refused to meet at reasonable times and for a reasonable number of hours when negotiating sessions were held.'' (G.C. Exh. 1i; Tr. 110–114.) In support of these allegations, the General Counsel called one witness, Staff Representative Robert Yaeger, to testify about scheduling, canceling, and postponing meetings and about the length of the negotiating sessions.

Although Yaeger impressed me as being a truthful witness, he apparently was testifying without having reviewed either his pretrial affidavit or his bargaining notes (to which he referred from time to time during his testimony, but which are not in evidence). Appearing to have only a hazy memory of the various events over the 10-month period, he gave much inexact and inaccurate testimony, instead of accurate, detailed testimony that would support the allegations.

His testimony and his various letters written at the time to Counsel Bochner do establish that meetings were held during the 10-month period on March 5, April 21, July 6, October 20, and November 4, 18, and 29. (Tr. 83–94, 128–131; G.C. Exhs. 10–13, 16.) Thus, there were long delays before the July 6 and October 20 meetings.

The delay before the July 6 meeting, as well as part of the delay after that meeting (before the August 23 meeting was scheduled), was caused by the refusal of the Respondent to provide requested information that the Union was seeking. (G.C. Exhs. 13, 16; Tr. 86.) The allegations of refusal to furnish information, however, were withdrawn before the trial. (G.C. Exhs. 1i, 1r.) The 2-month delay before the October 20 meeting was caused, as found, by the Respondent's refusal to bargain while the NLRB charge was pending.

Because of the nature of Yaeger's testimony, not being a reliable account of the scheduling, cancellation, and postponement of various meetings and the length of certain meetings, I find that the General Counsel has failed to prove that the Respondent failed to meet at reasonable times and for a reasonable number of hours.

I therefore find that these allegations must be dismissed.

3. Unilateral decrease in wage rate

Since LPN Harriet Boykin was hired in December 1992, her wage rate had included a $1-an-hour bonus for each hour she worked during the previous month. Sometime in July, when she did not get her bonus check for June, she asked Executive Director Urgo why. Nursing Director Aponte, who was present, explained: ''I am taking over the bonus program now and I stopped it.'' The Respondent had not notified the Union, nor given it an opportunity to bargain, about the reduction in the wage rate. (Tr. 201–203, 230, 247; G.C. Exh. 22.)

Boykin did not report to the Union that the Respondent had eliminated her hourly bonus until January 1994 (Tr. 204). The Union filed its charge in Case 4–CA–22433 (G.C. Exh. 1w), alleging a unilateral reduction in her hourly wage rate, on February 14, 1994—over 7 months after the unilateral change.

Boykin explained at the trial that she did not report the stopping of the bonus check at the time because ''I didn't know I could. I didn't know that we were really covered by the union since the contract hadn't been signed'' (Tr. 204).

As found, the Union was certified as the bargaining representative on October 27, 1992, and the Respondent and Union were engaged in contract negotiations.

I agree with the Respondent that the complaint in Case 4–CA–22433 ''should be dismissed as being barred by the period of limitations specified in Section 10(b) of the Act.''

Relying on *Adair Standish Corp.*, 295 NLRB 985, 986 (1989), the General Counsel contends that the 6-month limitation period did not begin to run until the Union had actual or constructive knowledge of the unfair labor practice. The General Counsel contends that ''In *Adair*, it was of no significance that members of the bargaining unit knew of the [unilateral] change.''

I find, however, that *Adair* is distinguishable. There, as the Respondent points out in its brief (at 5), the Board said that ''the fact that the members of the bargaining unit knew of the change does not necessarily mean that the Union did, particularly where, as here, *the Employer has refused to recognize the Union*.'' (Emphasis added.) Similarly in *Clark Equipment Co.*, 278 NLRB 498, 529 (1986), which is cited in *Adair*, the Board rejected the employer's contention that the union had constructive notice ''where the Union is being denied its lawful status as bargaining representative.'' Here, in contrast, the Respondent was bargaining with the Union, which had one or more employees in the nursing home on its negotiating committee. (Tr. 241–246.)

I find that the Union had constructive knowledge of the decrease in Boykin's wage rate. I therefore find that the charge, filed over 6 months later, was untimely.

CONCLUSIONS OF LAW

1. By discriminatorily discharging Robert Grimaldi on June 2, 1993, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

2. By refusing to bargain unless the Union requested withdrawal of its NLRB charge, the Respondent violated Section 8(a)(5) and (1).

3. The General Counsel has failed to prove that the Respondent refused to meet at reasonable times and for a reasonable number of hours.

4. The charge filed by the Union in Case 4–CA–22433, alleging an unlawful unilateral reduction in an employee's hourly wage rate over 6 months earlier, was untimely filed because the Union had constructive knowledge of the unilateral action within the 10(b) 6-month limitation period.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having discriminatorily discharged an employee, the Respondent must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Michael Konig t/a Nursing Center at Vineland, Vineland, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting Communications Workers of America, Local 1040, AFL–CIO or any other union.

(b) Refusing to bargain unless the Union requests withdrawal of an NLRB charge.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Robert Grimaldi immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful discharge and notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Vineland, New Jersey, copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the consolidated complaint is dismissed insofar as it alleges violations of the Act not specifically found.

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[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''